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**FIRST GENERAL COUNSEL'S REPORT**

MUR: 5555  
DATE COMPLAINT FILED: October 5, 2004  
DATE OF NOTIFICATION: October 13, 2004  
LAST RESPONSE RECEIVED: Nov. 21, 2005  
DATE ACTIVATED: August 9, 2005

EXPIRATION OF SOL: May 20, 2009

**COMPLAINANT:**

Chris Vance

**RESPONDENTS:**

Dave Ross  
Friends of Dave Ross and Philip Lloyd, in his  
official capacity as treasurer  
Entercom Seattle, LLC (d/b/a KIRO-AM)

**RELEVANT STATUTES  
AND REGULATIONS:**

2 U.S.C. § 441i(e)(1)(A)  
2 U.S.C. § 441b(a)  
2 U.S.C. § 431(9)(B)(i)  
2 U.S.C. § 434 (f)(3)(B)(i)  
11 C.F.R. § 109.21  
11 C.F.R. § 100.73  
11 C.F.R. § 100.132  
11 C.F.R. § 100.29(c)(2)

**INTERNAL REPORTS CHECKED:** None

**FEDERAL AGENCIES CHECKED:** None

**I. INTRODUCTION**

Dave Ross, host of a talk show on radio station KIRO-AM in Seattle, Washington, was a  
candidate for U.S. Representative from the 8<sup>th</sup> Congressional District of Washington in 2004.  
The complaint in this matter alleges that in a variety of ways, KIRO-AM knowingly and  
willfully made, and Ross and his campaign committee knowingly and willfully accepted, illegal  
corporate in-kind contributions. Because we conclude that the media exemption applies, we

1 recommend that the Commission find no reason to believe that any of the respondents violated  
2 the Act in connection with the allegations in MUR 5555, and close the file.

3 **II. FACTS**

4 Dave Ross is a radio talk show host in Seattle, Washington. Ross has hosted "The Dave  
5 Ross Show" (the "Show") on KIRO-AM (the "station") since 1987.<sup>1</sup> The Show airs in  
6 Washington's 8<sup>th</sup> Congressional District five days a week for three hours a day, and on it Ross  
7 "discusses news, current events, politics, entertainment, technology, and a range of other  
8 subjects." See Response of Dave Ross and Friends of Dave Ross ("Ross Response") at 4; see  
9 also Response of Entercom and KIRO-AM ("KIRO Response") at 2. In addition to broadcasting  
10 his own show, Ross occasionally provides short commentaries while substituting for Charles  
11 Osgood on "The Osgood File" on CBS News Radio, which is carried by approximately 240  
12 stations nationwide, including KIRO-AM. *Id.*

13 Complainant alleges that Dave Ross effectively received free air time on his own show to  
14 promote his candidacy, and that the radio station illegally contributed to his campaign by  
15 providing him with that air time and continuing to promote the Show throughout the 2004  
16 campaign season. Specifically, complainant asserts the following:

- 17 • On May 5, 2004, during the Show, Ross first discussed on the air the possibility of his  
18 running for Washington's 8<sup>th</sup> Congressional District seat.
- 19 • Between May 5 and May 20, 2004, a guest host on the Show allegedly asked listeners  
20 whether Ross should run for Congress, and an online survey on the same topic ran on  
21 the station's web site.

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<sup>1</sup> Because Entercom Seattle, LLC ("Entercom") owns and operates KIRO-AM, OGC also notified Entercom of the complaint.

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- 1 • On May 20, 2004, Ross announced his decision to run for Congress, saying that he  
2 would stay on the air until July.<sup>2</sup>
- 3 • Also on May 20, according to a *Seattle Times* column attached to the complaint, the  
4 KIRO-AM web site reportedly "heralded Ross' candidacy with headlines stating  
5 'Dave for Congress (1)' and 'Dave for Congress (2),' and a prominent link to his  
6 campaign Web site." *See* Complaint, Ex. 10.
- 7 • In June of 2004, Dave Ross became a candidate for Congress from Washington's 8<sup>th</sup>  
8 Congressional District.<sup>3</sup> Ross stayed on the air and continued to host the Show until  
9 July 23, 2004, when he began a leave of absence until after the general election in  
10 November 2004.
- 11 • From July 23, 2004, when Ross stopped hosting his show, through the general  
12 election in November, KIRO-AM continued referring to Ross' daily time slot as "The  
13 Dave Ross Show," using guest hosts to run it. The station also continued promoting  
14 "The Dave Ross Show" on the air and on its web site.
- 15 • From August 16 through August 20, Ross gave 19 commentary pieces for CBS News  
16 radio, which "may have aired in Washington's 8<sup>th</sup> Congressional District on CBS

<sup>2</sup> Complainant asserts that Ross announced his candidacy "on his own talk show." *See* Complaint at 1. According to contemporary news reports attached to the Complaint at Ex. 6 & 7, however, Ross announced his candidacy during an event called "Battle of the Talk Show Hosts," broadcast on KIRO-AM in the evening of May 20, 2004. *See Sparks Fly Over Radio Host's Political Bid*, CHI. TRIB., May 23, 2004, at C15; and Warren Cornwall, *Ross Reveals He's Candidate*, SEATTLE TIMES, May 21, 2004, at B1. The station's response states that Ross' announcement was in response to a direct question asked of him by the emcee of the event concerning "rumors" she had heard. *See* KIRO Response at 2. Neither KIRO nor Entercom had prior knowledge that such an exchange would occur. *Id.*

<sup>3</sup> Though complainant and respondents dispute the date Ross officially became a candidate for federal office, it appears from the Committee's disclosure reports that Dave Ross became a candidate under 2 U.S.C. §431(2) and 11 C.F.R. § 100.3(1) on June 2, 2004, when he received contributions aggregating in excess of \$5,000.

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1 affiliate KIRO-AM." The station states that "it is believed that KIRO discontinued  
2 airing [Ross' CBS] commentaries until after the election." KIRO Response at 4.

3 • On September 14, 2004, Dave Ross won the primary election. On September 15,  
4 according to a news article in the *Seattle Times*, "'The Dave Ross Show' featured  
5 Dave Ross as special guest to discuss his primary victory." See Complaint, Ex. 15.

6 Ross lost the general election on November 2, 2004, and on November 3 he returned to  
7 hosting the Show on KIRO-AM.

8 **III. LEGAL ANALYSIS**

9 **A. Alleged Corporate Contributions and the Media Exemption**

10 The Federal Election Act of 1971, as amended (the "Act"), prohibits corporations from  
11 making contributions or expenditures from their general treasury funds "in connection with" the  
12 election of any candidate for Federal office. 2 U.S.C. § 441b(a). The Act defines "contribution"  
13 and "expenditure" to include "anything of value" made for the purpose of influencing any  
14 election for Federal office. 2 U.S.C. § 431(8) and (9). The term "anything of value" includes in-  
15 kind contributions. 11 C.F.R. § 100.52(d)(1). Contributions and expenditures must be disclosed  
16 under the Act. 2 U.S.C. §§ 432 and 434.

17 The Act's media exemption excludes from the definitions of contribution and expenditure  
18 "any cost incurred in covering or carrying a news story, commentary, or editorial by any  
19 broadcasting station . . . unless the facility is owned or controlled by any political party, political  
20 committee, or candidate." 2 U.S.C. § 431(9)(B)(i); 11 C.F.R. §§ 100.73 and 100.132.

21 Any party claiming the media exemption is subject to a two-part test. First, the  
22 Commission asks whether the entity engaging in the activity is a media entity within the meaning  
23 of the Act and the Commission's regulations. See Advisory Opinion 2005-16 (Fired Up) at 5

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1 and other advisory opinions cited therein. Second, the Commission, in determining the  
2 exemption's scope, inquires (a) whether the media entity is owned or controlled by a political  
3 party, committee, or candidate; and, if not, (b) whether the entity was functioning within the  
4 scope of a legitimate media entity at the time of the alleged violation. If the media entity is  
5 independent of any political party, committee, or candidate, and if it was acting as a legitimate  
6 media entity at the time of the alleged violation, it is exempt from the Act's restrictions on  
7 corporate contributions and expenditures, and the Commission's inquiry should end. *See id.*; *see*  
8 *also Reader's Digest Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981); and *FEC v.*  
9 *Phillips Publishing*, 517 F. Supp. 1308, 1312-13 (D.D.C. 1981). As the Commission noted in a  
10 recent Advisory Opinion, "[t]wo considerations in applying this analysis include whether the  
11 entity's materials are available to the general public and are comparable in form to those  
12 ordinarily issued by the entity." Advisory Opinion 2005-16 (Fired Up) (citing, in part, *FEC v.*  
13 *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 251 (1986) ("MCFL")).<sup>4</sup>

14 KIRO-AM, a broadcast radio station owned and operated by Entercom Seattle, LLC,  
15 whose parent company is Entercom Communications Corporation, one of the largest radio  
16 broadcasting companies in the United States, *see* Ross Response at 4; KIRO Response at 1, is the  
17 type of media entity covered by the media exemption and is not owned or controlled by a  
18 political party, committee or candidate. The sole question in this matter, then, is whether, in the  
19 course of the facts and events stated above, the station was acting within its legitimate press  
20 function. On this question, MUR 4689 (Dornan) is instructive.

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<sup>4</sup> Because we determined the press exemption applies in this matter, we have not analyzed the facts on the basis of three earlier Advisory Opinions addressing similar situations where talk show hosts were also candidates for Federal office. *See* Advisory Opinions 1977-42 (Hechler), 1992-5 (Moran) and 1992-37 (Terry). In all three instances, the Commission determined, on the basis of the requests, that the media forum was not to be provided to the hosts "for the purpose of influencing any election for Federal office," and therefore concluded that the air time would not be "contributions" to them or "expenditures" on their behalf by the broadcasting entities. The media exemption was not a factor in the Commission's analyses.

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1 In 2000, the Commission, by a vote of 4-2, found no reason to believe that Robert  
2 Dornan, a Federal candidate who guest hosted several nationally-syndicated radio shows on  
3 various broadcasting stations, his campaign committee, or two radio networks violated the Act.  
4 See MUR 4689. In that matter, Dornan allegedly used radio air time to attack his political  
5 opponent and expressly advocate on behalf of his own election.

6 According to the Statement of Reasons of the four commissioners who voted to find no  
7 reason to believe, because the broadcasting stations involved were not owned or controlled by a  
8 party or candidate and the entities were acting in their capacities as members of the media in  
9 airing the programs -- with no indication that any aspect of the shows were different when  
10 Dornan guest-hosted than when the regular host appeared -- the media exemption applied. See  
11 Statement of Reasons by Commissioners Wold, Elliott, Mason, and Sandstrom in MUR 4689.  
12 Since it "appeared that the activities complained of [were] protected by the press exemption," the  
13 four commissioners stated that the Commission lacked subject matter jurisdiction in the matter  
14 and could not proceed further. Specifically, the Commission was precluded from "inquiring  
15 further into the contents of Mr. Dornan's speech." *Id.* at 3.<sup>5</sup>

16 There appears to be even less indication here than in the Dornan matter that anything  
17 about the Show changed after Ross became a candidate and stayed on the air. "The Dave Ross  
18 Show" has long been a regular broadcast containing "news stor[ies], commentary, or editorial,"  
19 as required by 11 C.F.R. § 100.73. Moreover, the Ross Response explicitly states that "[n]either

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<sup>5</sup> The four commissioners also stated there was no evidence that Dornan was invited to be guest host because of any possible future status as a candidate, and that he did not appear to be a candidate when most of the programs aired. *Id.* They further stated that, even if they had determined that the press exemption was not applicable, they would have declined to pursue the matter for reasons of prosecutorial discretion. *Id.* Commissioner Mason, "[w]hile in complete agreement with the joint agreement [he] signed with [his] colleagues," also wrote an Additional Statement of Reasons in the Dornan matter "to emphasize [his] view that this matter . . . did not constitute a close call [because] [t]he media exemption . . . so clearly applies that pursuing this matter would not have been substantially justified." Additional Statement of Reasons by Commissioner Mason in MUR 4689 at 1.

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1 the format, distribution, or other aspects of production of The Dave Ross Show were altered for  
2 the period in question of May 5, 2004, through July 23, 2004." Ross Response at 4; *see also*  
3 KIRO Response at 3 ("Mr. Ross was not permitted to alter the format of his show in any way to  
4 assist in his campaign for office"). Contemporary press articles from *The Seattle Post-*  
5 *Intelligencer* attached to the complaint reported that Ross would not use the Show "for  
6 electioneering," and that Ross "promised station management that he would not use his show for  
7 campaigning or for discussing issues that would be of unique interest to voters in the 8<sup>th</sup>  
8 District." *See* Complaint at Ex. 9 and 11. There is no information in the complaint or elsewhere  
9 suggesting he reneged on this promise. In fact, as noted in the station's response, "in addition to  
10 avoiding discussion of his candidacy, Mr. Ross specifically avoided any solicitation of or  
11 response to any questions by listeners regarding his candidacy during the call-in portions of the  
12 show." KIRO Response at 3. Moreover, "[o]ther on-air personalities were also given strict  
13 directives [by the station] prohibiting them from referring to Mr. Ross' campaign on the air." *Id.*

14 Only twice did Ross refer to his candidacy or potential candidacy on KIRO before taking  
15 a leave of absence. On May 5, he stated on the Show that he was considering running, and on  
16 May 20, in response to a question posed to him on the "Battle of the Talk Show Hosts" program,  
17 he acknowledged that he was running. We have no indication that Ross did anything more on  
18 these occasions than make simple statements along these lines, and therefore these incidents do  
19 not appear to take either the May 5 "Dave Ross Show" or the May 20 "Battle of the Talk Show  
20 Hosts" outside the station's legitimate press function.

21 As to Ross' guest interview about his primary election victory, the station's response  
22 states that the format of the interview was "undertaken in a format that would be used to  
23 interview any current candidate for office." KIRO Response at 4. The station points out that it

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1 also interviewed "all of Mr. Ross' potential Republican opponents in the primary," aired a debate  
2 between Ross and his Republican opponent, Mr. Reichert, and also hosted Mr. Reichert alone for  
3 an interview on October 19, 2004. *Id.* All such events also appear to fall within the legitimate  
4 press function of KIRO-AM radio. More generally, we have no indication that the broadcasts of  
5 "The Dave Ross Show" as broadcast with guest hosts between July 23 and election day were  
6 anything other than regularly scheduled programs of news, editorials or commentary.

7 Similarly, in the 19 transcripts of Ross' appearances on CBS Radio's "The Osgood File"  
8 submitted with the complaint, there is no instance of Ross even mentioning his candidacy, let  
9 alone expressly promoting his own campaign or attacking that of another. *See* Complaint, Ex.  
10 13. All of these commentaries appear well within the legitimate press function of CBS and  
11 KIRO-AM radio.

12 The "poll" taken on the air and on the KIRO web site asking whether Ross should  
13 become a candidate also appears to fall within the media exemption. *See* Advisory Opinion  
14 2004-7 (advising MTV that online and call-in audience survey would be within its "legitimate  
15 press function"). The Show regularly featured discussions about news, politics, and current  
16 events. It falls within the range of what qualifies as a "legitimate press activity" for such a show  
17 to post on its web site surveys regarding issues in politics, current events, and popular culture.  
18 Online surveys regarding current events are, in fact, commonly found posted on any number of  
19 radio show web sites,<sup>6</sup> and, again, are well within the shows' legitimate press function.  
20 Moreover, although the results of the survey are unknown, it does not appear that any attempt  
21 was made to have it be statistically accurate, and there is no allegation or information that Ross

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<sup>6</sup> *See, e.g.,* [www.rushlimbaugh.com](http://www.rushlimbaugh.com), [www.hannity.com](http://www.hannity.com), and [www.bigeddie.com](http://www.bigeddie.com). Indeed, in October 2005, after President Bush's announcement, KIRO-AM's web site (found at [www.kiro710.com](http://www.kiro710.com)) featured an online poll asking listeners to "[r]ate the selection of Harriet Miers as the new Supreme Court nominee."

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1 or the Committee requested, authorized, pre-arranged or coordinated the conducting of the poll  
2 prior to its being made public, or used its results. *See* 11 C.F.R. § 106.4(b) and (c). The poll,  
3 therefore, should not be treated as a “testing the waters” contribution or expenditure. *See*  
4 11 C.F.R. §§ 100.131(a) and 101.3.

5 Finally, the complaint alleges that KIRO-AM's web site posted “Ross for Congress”  
6 headlines and a link to the Ross campaign web site immediately after Ross' announcement of  
7 candidacy on May 20, 2004, but provides no further details.<sup>7</sup> We do not have a copy of the  
8 station's web site that carried those alleged communications. Because we could not locate a  
9 copy of the web site as it stood on May 21, 2004, and complainant did not include one, we can  
10 not know what text accompanied the “Dave for Congress” headlines, or whether the  
11 accompanying text was anything other than news stories about Ross' declaration of candidacy,  
12 itself a newsworthy event. According to the station, “although there were contemporaneous  
13 references to Mr. Ross' announcement at that time, KIRO officials ordered their removal  
14 immediately after these references were discovered.” KIRO Response at 6. To the extent these  
15 materials may have contained express advocacy, entities falling within the media exemption may  
16 endorse candidates and provide references to other sources for additional information. *See*  
17 Advisory Opinion 2005-16 at 6 (Fired Up) (concluding that because the entity is a press entity,  
18 and neither it nor its web site is owned or controlled by a political party, committee, or candidate,  
19 the cost for covering news stories, commentary and editorials on its web sites – even those  
20 lacking objectivity – were covered by the press exemption); *see also* KIRO Response at 6

<sup>7</sup> The complaint includes two unnumbered attachments following Ex. 15, which appear to show a logo for KIRO-AM that resembles a logo that reads “Dave Ross for Congress.” The station “categorically denies giving Mr. Ross any permission to use any type of KIRO trade dress in connection with his campaign for office.” It states, however, that when it learned of the “similarity” between the station's logo and the campaign logo, “it demanded that the logo be changed,” and “it is Entercom's understanding that it was.” KIRO Response at 3.

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1 (“[R]eferences to Mr. Ross’ announcement . . . were also protected by the press exemption as the  
2 KIRO web site was merely an extension of the radio station’s regular media operations.”)

3 **B. Alleged Electioneering Communications**

4 **1. CBS News Radio**

5 The same media exemption analysis discussed above also applies to Ross’ appearances  
6 on CBS News Radio, possibly broadcast through KIRO-AM, between August 16 and 20, 2004.  
7 According to the station’s response, it believes that although Ross continued to provide  
8 commentaries for CBS after he left the Show on July 23, 2004, KIRO discontinued airing the  
9 commentaries until after the general election. *See* KIRO Response at 4. At no time during those  
10 broadcasts did Ross mention his candidacy. *See* discussion, *supra*. An electioneering  
11 communication occurs where a broadcast, cable, or satellite communication targeted to the  
12 relevant electorate clearly identifies a Federal candidate within 30 days of a primary election or  
13 60 days of a general election. *See* 11 C.F.R. § 100.29(a). Although Ross, a candidate, was  
14 clearly identified during those broadcasts within 30 days of his September 14, 2004 primary, *see*  
15 Complaint, Ex. 13, such communication “appearing in a news story, commentary, or editorial  
16 distributed through the facilities of any broadcast station” not owned or controlled by any  
17 political party, committee, or candidate is excluded from the definition of “electioneering  
18 communication” under 2 U.S.C. § 434(f)(3)(B) and 11 C.F.R. § 100.29(c)(2).

19 In this case, neither CBS News Radio nor KIRO-AM are owned or controlled by any  
20 political party, committee or candidate. Those broadcasts, then, also fall within the legitimate  
21 press function of CBS News Radio and KIRO-AM, and qualify for the specific media exemption  
22 for electioneering communications.<sup>8</sup>

<sup>8</sup> The complaint did not name CBS News Radio as a respondent. In view of our recommended disposition, we are not recommending that CBS News Radio be generated as a respondent.

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2. KIRO-AM

Dave Ross stopped hosting the Show on July 23, 2004, more than 30 days before the primary election on September 9, and more than 60 days before the general election on November 2. As noted, the Show continued to be broadcast with guest hosts under the name "The Dave Ross Show." KIRO-AM also continued advertising the Show on the air after July 23, broadcasting promotions for "The Dave Ross Show" in the 8<sup>th</sup> Congressional District within 30 days of the primary and within 60 days of the general election. Although motive is not relevant to whether a communication is considered "electioneering," according to the station, it did so "based solely upon business decisions in order to prevent dilution of its most coveted on-air product." KIRO Response at 5.

KIRO's broadcasts of the Show under the name "The Dave Ross Show" within the electioneering communications period qualified for the specific media exemption for electioneering communications just as they qualified for the media exemption from the definition of "expenditure." As for the promotional spots, several courts have recognized the dissemination of publicity to be the "normal business activity of a press entity" deemed to fall within the media exemption of the Act. See *MCFL*, 479 U.S. at 251 (citing *Phillips Publishing*, 517 F.Supp. at 1313; and *Reader's Digest*, 509 F.Supp. 1210). The Commission, too, addressed this issue in an Advisory Opinion to MTV, advising that promotions intended to "publicize [a] program" would fall within its "legitimate press function." Advisory Opinion 2004-7 at 5 (quoting *Reader's Digest*, 509 F. Supp. at 1215 (noting the media exemption applied to magazine's dissemination of promotional materials whose purpose was "to publicize [an] issue of the magazine"); and quoting *Phillips Publishing*, 517 F. Supp. at 1313 (stating that obtaining publicity qualifies as a "normal, legitimate press function[]")). In the same opinion, the Commission reached the

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1 conclusion that "any broadcast, satellite or radio communication that MTV undertakes as part of  
2 its press functions is exempt from the definition of electioneering communication." Advisory  
3 Opinion 2004-7 at 8.

4 For the same reasons the Show's broadcasts qualify for the Act's general media  
5 exemption, then, the station's continued promotional use of the Show's name also qualifies for  
6 the media exemption for what would otherwise be an electioneering communication.

7 **C. Coordinated Communications Allegations**

8 The media exemption, where applicable, also encompasses what otherwise would be  
9 deemed a "coordinated communication" between a candidate or committee and a *bona fide*  
10 corporate media entity, which might lead to violations of section 441b. See 11 C.F.R.  
11 §109.21(b); 11 C.F.R. §§ 100.73 and 100.132. Since the media exemption applies to the activity  
12 in this case, the alleged coordinated communications do not violate the Act.

13 **D. "Soft Money" Allegations**

14 Federal candidates and their agents, or entities directly or indirectly established, financed,  
15 maintained or controlled by, or acting on behalf of one or more candidates, are restricted from  
16 soliciting, receiving, directing, transferring, or spending "soft money," *i.e.*, funds that are not  
17 subject to the limitations, prohibitions, and reporting requirements of the Act. See 2 U.S.C.  
18 § 441i(e)(1)(A). Neither Ross nor the Committee appear to be in violation of this provision.  
19 Though complainant charges that Ross continuing to broadcast his show resulted in "free  
20 corporate air time" for his campaign, because these activities are exempt from the definitions of  
21 "contribution" and "expenditure" under the media exemption, 11 C.F.R. §§ 100.73 and 100.132,  
22 neither he nor the Committee received illegal corporate contributions in violation of 2 U.S.C.  
23 § 441i(e)(1)(A).

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Based on the above, this Office recommends that the Commission find no reason to believe that Dave Ross; Friends of Dave Ross and Philip Lloyd, in his official capacity as treasurer; or Entercom Seattle, LLC (d/b/a KIRO-AM) violated the Act, and close the file.

**V. RECOMMENDATIONS**


1. Find no reason to believe that Dave Ross; Friends of Dave Ross and Philip Lloyd, in his official capacity as treasurer; or Entercom Seattle, LLC (d/b/a KIRO-AM) violated the Federal Election Act of 1971, as amended, or the Commission's regulations in connection with the allegations in MUR 5555.
2. Close the file.
4. Approve the appropriate letters.

Date

1/12/06

  
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